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‘Paedophile Hunters’, Criminal Procedure, and Fundamental Human Rights

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‘Paedophile hunters’ have attracted global media attention. The limited literature on paedophile hunters, which documents their emergence in contemporary liberal democracies, pays scant attention to how their use of intrusive investigative methods may threaten the procedural rights of suspects and undermine the integrity of the criminal justice system. This article fills this normative ‘gap’ in the literature. It draws upon media coverage, criminal procedure jurisprudence, and criminological scholarship to analyse the regulation of paedophile hunting in English and Welsh law. The article suggests that domestic law does not afford adequate protection to due process and the fundamental human rights of those falling under the paedophile hunter’s purview. Unless paedophile hunting is constrained by a narrower and more robustly enforced regulatory regime, it should not be permitted, let alone encouraged, in contemporary liberal democracies.

INTRODUCTION

This article analyses the regulation of the activities of so-called ‘paedophile hunters’. It suggests that paedophile hunters, as citizens using proactive policing methods, can pose a unique threat to the fundamental rights of those whom they target, which lawmakers and practitioners have not adequately managed.

Although there are variances in how different groups operate, paedophile hunters predominantly pose as children on social media platforms and in online chatrooms and lure potential child sex offenders to an ostensible illicit

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sexual encounter. Here, the suspect is confronted by the hunters, who then typically report the alleged crime to the police and post video footage of the confrontation on social media.

Paedophile hunters are amateurs. Their operations often require little more than a broadband connection and a camera phone. Though employing crude methods, these groups are incredibly popular, sometimes attracting hundreds of thousands of followers to their social media pages. Some paedophile-hunting groups have assisted the authorities in bringing child sex offenders to justice. According to data obtained by the British Broadcasting Corporation (BBC), evidence provided by paedophile-hunting groups was used to support 150 of the 302 prosecutions for the offence of meeting a child following sexual grooming in 2017.¹ The official line of the police is that these groups should not be encouraged and may face prosecution for any offences that they commit.² However, paedophile hunters are very rarely prosecuted for offences.³ On the back of their popularity and purported success, senior police figures have even reached out to paedophile-hunting groups to offer vague opportunities for collaboration in the fight against child sexual abuse.⁴ These groups are controversial, and some have attracted negative attention after engaging in vigilante tactics, inciting criminality, and smearing innocent people.⁵ This raises the question: are these overtures to paedophile hunters imprudent?

This article answers the question affirmatively. It suggests that many of the investigatory practices of paedophile hunters are antithetical to numerous core values and functions of the criminal justice system. The under-regulated paedophile hunter may also undermine state-sanctioned efforts to prevent, detect, and prosecute child sex offences. The article brings normative legal analysis to what has, up to this point, been a largely descriptive conversation among criminologists. This criminological literature documents developments in citizen-led policing, but pays scant attention to how paedophile hunters' use of proactive and intrusive investigative methods may threaten the procedural rights of suspects and undermine the integrity of the criminal justice system.

1 BBC News, "Paedophile Hunter" Evidence Used to Charge 150 Suspects', 10 April 2018, at <<https://www.bbc.co.uk/news/uk-england-43634585>>.

2 S. Bailey and M. Skeer, *National Guidance on Responding to Online CSA Vigilante Groups* (2017).

3 It is only in cases where paedophile hunters resort to violence that they tend to be charged. J. Simpson, 'Paedophile-Hunters Are Warned Off by Police after Brawl' *Times*, 19 April 2017, at <<https://www.thetimes.co.uk/article/paedophile-hunters-are-warned-off-by-police-after-brawl-2cbzcpkpg>>.

4 BBC News, 'Recruit "Paedophile Hunters" Call to Help Police', 5 July 2017, at <<http://www.bbc.co.uk/news/uk-wales-40497162>>; K. Sandeman, 'Why Nottinghamshire Police Could Strengthen Links with Paedophile Hunters' *Nottingham Post*, 9 October 2018, at <<https://www.nottinghampost.com/news/nottingham-news/nottinghamshire-police-could-strengthen-links-2090840>>.

5 BBC News, "Paedophile Hunter" to Face Criminal Charges', 14 February 2018, at <<https://www.bbc.co.uk/news/uk-northern-ireland-43049316>>.

The article is structured in four parts. The first traces the emergence of paedophile hunting, situating the practice, and police responses to it, in social context. The next three parts consider the impact that paedophile hunting has on the criminal process, and those subject to it, through reference to the following broad, and somewhat overlapping, areas: the administration of justice; due process and procedural rights; and stigmatization and collateral intrusion. Cumulatively, these parts demonstrate that English and Welsh law is failing to adequately regulate the activities of paedophile hunters. The muted response of the police, Crown Prosecution Service (CPS), and domestic courts to paedophile hunters is failing to deter their criminality. The article ends with suggestions for reappraisal of existing legal doctrines, law reform, and more rigorous enforcement to control and, in some cases, deter paedophile hunting.

THE EMERGENCE OF PAEDOPHILE HUNTING

There is an unsurprising political and public unanimity regarding the wrongness of child sex offences, and the threat posed by the 'paedophile'.⁶ Following a small number of high-profile cases of child abduction, rape, and murder since the 1980s, public anxieties have been oriented away from the sexual abuse of children by family members and towards the threat posed by strangers.⁷ In England and Wales, these cases led to expansive law reform covering numerous areas, including disclosure schemes designed to empower parents to check if sex offenders could gain access to their children,⁸ and an overhaul of the system governing police information-sharing practices and

6 There is no offence of 'paedophilia' in English criminal law, and it is more accurate to speak of 'child sexual abuse' or 'child sex offending' when referring to the sorts of crimes that paedophile hunters seek to remediate. However, given this article's focus on the intersection between public and legal responses to crime, I use the terms 'paedophilia' and 'paedophile' not to refer to any kind of psychological or neurological disorder, but as expressions that are widely recognizable and have popular currency in the media. A similar approach is used in other works. See, for example, E. Campbell, 'Policing Paedophilia: Assembling Bodies, Spaces and Things' (2016) 12 *Crime, Media, Culture* 345.

7 This trend has occurred despite research indicating that the vast majority of child sexual abuse is perpetrated by an adult offender known personally to the victim. Y. Jewkes and M. Wykes, 'Reconstructing the Sexual Abuse of Children: "Cyber-Paeds", Panic and Power' (2012) 15 *Sexualities* 934, at 935; L. Radford et al., *Child Abuse and Neglect in the UK Today* (2011).

8 The child sex offender disclosure scheme (sometimes referred to as 'Sarah's Law' owing to the fact that the scheme was introduced following a campaign by the family of eight-year-old Sarah Payne in the aftermath of her kidnap and murder) was rolled out across police forces in England and Wales in 2011. Suffolk Constabulary, 'Sarah's Law', at <<https://www.suffolk.police.uk/advice/child-protection/sarahs-law>>.

criminal records checking.⁹ Such offences have since become a mainstay of tabloid and broadsheet newspapers.¹⁰

Jewkes and Wykes note that this recent construction of the ‘dangerous paedophile’ in media discourses and policy initiatives was instrumental in changing patterns of social interaction to put emphasis on the safety and security of children.¹¹ Information technology and the internet have given child sex offenders new opportunities to offend, making images of child sexual abuse easier to distribute and children more accessible. Offenders can now utilize social media platforms to ‘groom’ children online: establishing friendships with children, gaining their trust, and lowering their inhibitions for the purpose of sexual abuse.¹² The emergence of this form of criminality in cyberspace has only served to heighten concerns, posing a novel threat to children that is more difficult for parents to understand or manage.

Online grooming has prompted innovative societal responses to predatory behaviour.¹³ These innovations are imbricated within broader trends towards what has variously been described as the ‘nodal governance’,¹⁴ ‘pluralization’, or ‘privatization’¹⁵ of policing, whereby the organization of crime control has transitioned away from state-centric, ‘top-down’ action to a more diversified assortment of activities that encompasses a range of quasi- and non-state actors.¹⁶ According to Jones, various factors motivate these trends, including

growing demands for policing and security services outstripping the resources of public providers, a degree of direct privatization and hiving off of policing functions as part of central government reform programmes, the changing nature of public space, and a range of broader structural changes in contemporary industrial societies that have contributed to growing concerns about risk and insecurity.¹⁷

The responsibility for policing child sex offences online is being taken up by numerous non-state actors and organizations, including internet service providers, social media platforms, and charities, who act in different ways to monitor and report the activities of paedophiles.¹⁸ Using the example of Facebook, Yar notes how the social media platform has been inspired to take pre-emptive action against online sexual abuse, which includes

9 H. Oliver and L. White, ‘Safeguarding Vulnerable Groups Act 2006: The Implications for Employers in Educational Settings’ (2008) 20 *Education and the Law* 235.

10 T. Thomas, *Sex Crime: Sex Offending and Society* (2016, 3rd ed.) 1.

11 Jewkes and Wykes, op. cit., n. 7, p. 935.

12 Thomas, op. cit., n. 10, p. 3.

13 Campbell, op. cit., n. 6, p. 346.

14 S. Burris et al., ‘Nodal Governance’ (2005) 30 *Aus. J. of Legal Philosophy* 31.

15 T. Jones, ‘The Governance of Security: Pluralization, Privatization, and Polarization in Crime Control’ in *The Oxford Handbook of Criminology*, eds. M. Maguire and R. Morgan (2012, 4th ed.) 841.

16 M. Yar, ‘The Policing of Internet Sex Offences: Pluralised Governance versus Hierarchies of Standing’ (2013) 23 *Policing and Society* 482, at 488.

17 Jones, op. cit., n. 15, p. 847.

18 Yar, op. cit., n. 16, p. 489.

removing the profiles of registered sex offenders and mobilizing users to report inappropriate sexual behaviour through its 'child protection app'.¹⁹

The combination of policing pluralization and the internet has created new avenues for citizens to 'get involved' in policing. The police have used social media to 'crowdsource' the analysis of public CCTV footage, harnessing the efforts of scattered social media users to assist in the identification of suspects captured on CCTV, at minimal cost.²⁰ Recently, internet users have gone beyond providing auxiliary support to the police. Nhan, Huey, and Broll analysed the role that crowdsourcing played in the aftermath of the Boston Marathon bombings in April 2013.²¹ According to the authors, the public, through the online forum Reddit, conducted their own investigation into the bombings, drawing on the diverse experiences and expertise of forum contributors to analyse relevant information. The authors found that such citizen-led investigations were a potentially useful source of professional knowledge and labour, largely untapped by the police.²²

Paedophile hunting might be characterized as a similar form of grassroots pluralized policing endeavour, with a key difference being that it blends online interactions with real-world confrontations. This article does not set out to examine in depth the similarities and differences between paedophile-hunting groups. However, some preliminary points are worth noting. First, paedophile-hunting groups adopt varying methods and practices. Some groups, for example, have engaged in violence against targets,²³ while others have tried to act in a professional way, training new members of their group, displaying an awareness of the laws governing criminal investigations, and providing evidence that leads to successful prosecutions.²⁴ One notable point of divergence is on how groups disseminate footage of their confrontations with targets. Some do not post videos before a target has been convicted of an offence, whereas others live stream confrontations straight to their social media pages, making no effort to conceal the target's identity.²⁵

19 Id.

20 D. Trotter, 'Crowdsourcing CCTV Surveillance on the Internet' (2013) 17 *Information, Communication & Society* 609, at 610.

21 J. Nhan et al., 'Digilantism: An Analysis of Crowdsourcing and the Boston Marathon Bombings' (2017) 57 *Brit. J. of Criminology* 341.

22 Id., pp. 348–349.

23 N. Shaw, 'Judge Slams "Wild West Culture" of Vigilante Paedophile Hunters' *Devon Live*, 10 May 2018, at <<https://www.devonlive.com/news/devon-news/judge-slams-wild-west-culture-1551190>>.

24 K. Hadjimatheou, 'Citizen-Led Digital Policing and Democratic Norms: The Case of Self-Styled Paedophile Hunters' (2019) *Criminology and Criminal Justice*, at <<https://doi.org/10.1177/1748895819880956>>.

25 R. Malcolm, 'Paedophile Hunters Live Streamed Moment They Confronted Man Who Thought He Was Meeting a 14-Year-Old Girl' *Nottingham Post*, 13 July 2019, at <<https://www.nottinghampost.com/news/local-news/paedophile-hunters-live-streamed-moment-3088530>>.

Paedophile hunters are also ‘networked’ to some extent.²⁶ Some groups have been known to share information about how they operate with other groups. Groups have also divided the labour of running a sting operation, with one group running the online part of the operation before sharing the evidence with another group, who then carry out the confrontation.²⁷ In some circumstances, paedophile hunters seem to form part of a broader ‘web’ of ‘self-help’ security provision.²⁸ For example, in Northern Ireland, the police have investigated links between paedophile hunters and loyalist paramilitary groups.²⁹ The position of paedophile hunters in the broader web of policing provision is complex, and merits further research falling beyond the scope of this article.

Online citizen-led policing has its uses. Indeed, paedophile hunters’ evidence has been used in numerous successful prosecutions for child-grooming offences, including cases involving repeat offenders.³⁰ The police have acknowledged that they are overwhelmed by a significant rise in online child sex offences,³¹ but as citizens attempt fill this policing ‘gap’, which has emerged in the digital age, the challenges that these attempts pose to established laws governing criminal investigations demand detailed and careful consideration. Three factors, taken together, make paedophile hunting a particularly useful case study of online citizen-led policing, against which to test its proper legal limits.

First, generally speaking, paedophile hunting goes further than other forms of online citizen-led policing, such as crowdsourcing or reporting abusive content, in that it involves the use of proactive and covert methods. Paedophile hunters frequently engage in covert online conversations of a sexual nature with targets, before meeting, confronting, and, sometimes, detaining them in real space. They play a role in facilitating the activities that they seek to suppress by creating fictitious online profiles for their targets to groom. While deceptive ‘honey-trap’ techniques are nothing new, they are not typically

26 J.-P. Brodeur, *The Policing Web* (2010) ch. 9; Campbell, op. cit., n. 6, p. 346.

27 BBC News, ‘Hull “Paedophile Hunter” Sting Targets Innocent Couple’, 6 November 2019, at <<https://www.bbc.co.uk/news/uk-england-sussex-50324952>>.

28 Campbell, op. cit., n. 6.

29 C. Barnes, ‘Shame of Northern Ireland Paedophile Hunters’ *Belfast Telegraph*, 12 February 2018, at <<https://www.belfasttelegraph.co.uk/sunday-life/news/shame-of-northern-ireland-paedophile-hunters-sins-of-the-lynch-mob-revealed-36589316.html>>.

30 L. Elvin, ‘Paedophile Hunters Catch Same Offender Twice with Two Separate Sting Operations’ *Independent*, 1 February 2018, at <<https://www.independent.co.uk/news/uk/crime/paedophile-entrapped-same-hunters-twice-nathan-wilson-child-sexual-abuse-convicted-offender-bristol-a8189281.html>>.

31 BBC News, ‘“Do Not Jail All Paedophiles”, Says Chief Constable’, 28 February 2017, at <<https://www.bbc.co.uk/news/av/uk-39116222/do-not-jail-all-paedophiles-says-chief-constable>>.

geared towards assisting the authorities to mount criminal prosecutions.³² The use of such covert and deceptive methods represents something of a step-change in online citizen-led policing, and raises pressing questions regarding the extent of the threat that this activity poses to the fair trial and privacy rights of suspects.

Second, some groups routinely engage in a punishment ritual by shaming their targets online. They tend to subject targets to prolonged face-to-face confrontations, demanding that their targets answer for any alleged crimes and disseminating footage of these confrontations to their followers on social media.³³ This represents a departure from the typical role played by citizens in policing, passively serving as the extra eyes and ears of the police. Other groups, such as foxhunt saboteurs, often engage in face-to-face confrontations when disrupting suspected illegal activities.³⁴ However, paedophile hunters are doing this on a scale that has not previously been seen in England and Wales, and domestic policymakers have yet to seriously grapple with the problems that this might pose for the criminal process.

Third, as paedophile hunters seem to have created a public perception of themselves as a force for good in the fight against child sex offences, they may have made it difficult for the police and courts to take appropriate steps to deter their activities.³⁵ As paedophile hunting continues to grow, clear thinking on its compatibility with core criminal justice values is vital, the more so because the policing of child sex offences has become, for perfectly understandable reasons, an emotive issue in the public mind. If paedophile hunters are perceived by the public to be ‘doing something’ about child sexual abuse, there is a danger that policy makers and practitioners sensitive to this public mood may take too placatory a stance towards these groups.

FIRST THREAT: THE ADMINISTRATION OF JUSTICE

Paedophile hunting may undermine the proper administration of justice in numerous ways, owing to the haphazard methods of evidence gathering by some paedophile hunters, and their frequent failure to comply with the rules

32 G. Diebelius, ‘“Honeytrap” Killer Who Led Boyfriend, 16, to Death Is Freed and Deported’ *Metro*, 12 May 2019, at <<https://metro.co.uk/2019/05/12/honeytrap-killer-led-boyfriend-16-death-freed-deported-9503715/>>.

33 Campbell, *op. cit.*, n. 6.

34 R. McGrath, ‘Meet the Saboteurs Who Say They’re Cracking Down on “Illegal Hunting”’ *Liverpool Echo*, 1 December 2018, at <<https://www.liverpoolecho.co.uk/news/liverpool-news/meet-saboteurs-who-say-theyre-15492772>>.

35 In September 2017, YouGov conducted a survey of 3,405 adults in Great Britain. Fifty-eight per cent of respondents suggested that the police working with paedophile hunters would be worth it if this led to more predatory paedophiles being caught, 25 per cent suggested that the police should find alternative ways to apprehend child sex offenders, and 17 per cent responded ‘Don’t know’. YouGov, at <<https://yougov.co.uk/opi/surveys/results#/survey/f239f61c-9c54-11e7-8370-e14fde485354>>.

of criminal evidence and procedure. First, some paedophile-hunting groups have adopted investigatory methods that may not stand up to scrutiny in court. A prominent example is the use of adult images and profiles to initiate interactions with their targets, before the decoy ‘admits’ that he or she is under the age of consent.³⁶ This tactic enables paedophile hunters to test the virtues of adult dating site users who may begin an interaction with someone whom they believe to be an adult dating site user, but then continue to engage in conversation after the decoy has informed the user that he or she is really a child. There are times when such a tactic may prove fruitful. For example, in *R v. Patel*, following a paedophile-hunting group’s use of this tactic, the police seized the target’s electronic devices and found hundreds of child pornography images and several chat logs, which revealed that the target had been engaged in online communications with several other children.³⁷

However, this tactic is dangerous as it could give those who wish to harm children grounds to dispute *mens rea* for an offence and escape justice.³⁸ The question of whether a paedophile hunter’s target believes he or she was illegally communicating with a child is, of course, a matter for the tribunal of fact to decide, weighing all of the evidence in a given case. That said, in using an image of an adult as part of a sting operation, which is predicated on the target attempting to groom a child, paedophile hunters make the tribunal of fact’s task needlessly difficult. This particular technique also risks inadvertently subjecting those who are innocently using a social networking site to meet adults to the harrowing ordeal of a paedophile-hunting sting.

English and Welsh law could exacerbate these problems. Often, targets of stings are charged with attempting to ‘meet a child following sexual grooming’ under s. 15 of the Sexual Offences Act 2003, read with s. 1 of the Criminal Attempts Act 1981. The s. 15 offence is drafted in such broad terms that a paedophile hunter’s target may have to do very little before committing the offence. As originally enacted, s. 15, when read with s. 1 of the Criminal Attempts Act 1981, required proof that the defendant communicated with a child at least twice, and travelled to meet the child, with the intention to commit a specified sexual offence on the child.³⁹ Following a series of amendments, which aimed to define s. 15 more narrowly,⁴⁰ the *actus reus* for this offence now requires as little as a single, non-sexual communication and an attempt to arrange a meeting with a child, whether or not any such meeting

36 *R v. Walters and Ali* [Crown Court of Newcastle, 6 April 2017], at <<https://www.judiciary.uk/wp-content/uploads/2017/04/r-v-walters-and-r-v-ali.pdf?LinkSource=PassleApp>>.

37 *R v. Patel* [2019] EWCA Crim 1058.

38 For example, under s. 10 of the Sexual Offences Act 2003, a defendant could conceivably claim that, owing to the use of an adult profile image, he or she had reasonable grounds to believe the ‘child’ was over 16.

39 Sexual Offences Act 2003, s. 15 (as enacted).

40 Criminal Justice and Immigration Act 2008, s. 73 and Sch. 15; Criminal Justice and Courts Act 2015, s. 36.

ever takes place. Such a broadly drawn *actus reus* may make it difficult for the tribunal of fact to discern the true intentions of a defendant, especially where paedophile hunters use adult images and profiles to initiate interactions with their targets, before the decoy ‘admits’ that he or she is in fact under the age of consent. The combination of minimal interaction between targets and decoys in a paedophile-hunting sting, and the use of adult profiles to initiate interactions, has served to create confusion as to the precise motivations of targets on a number of occasions.⁴¹

Poor investigatory practices such as this might also have the effect of unduly diverting criminal justice resources from sex offenders who pose a considerable risk to the public towards low-risk offenders, the so-called ‘low-hanging fruit’.⁴² In their own covert investigations, the police tend to focus their resources on dangerous offenders, whereas paedophile hunters focus on low-risk targets that may not even have been tempted to offend, but for the activities of paedophile hunters.

Concerns about the effect that paedophile hunting may have on police resources have also been expressed by the National Police Chiefs’ Council and the National Police Child Protection and Abuse Investigation working group.⁴³ The two policing governance bodies circulated an internal guidance document to police investigators, which articulated the view that the contributions of paedophile hunters to police investigations may be more hindrance than help, as significant input by the police is often required to manage and develop the evidence that these groups provide.⁴⁴

There are further risks to the administration of justice that may arise, depending on precisely how a particular paedophile-hunting group operates. As we have seen, some groups publicize their activities on social media and publish the personal information of individuals targeted. This could jeopardize subsequent criminal proceedings. As Smith explains, the integrity of the trial process may be compromised where ‘extraneous material is introduced into the process, as it potentially is when prejudicial commentary is made available to the members of the public who will eventually constitute the jury’.⁴⁵ The Contempt of Court Act 1981 established a strict liability rule

41 G. Bennett, ‘Judge Throws Out Court Case Involving Man Detained by “Paedophile Hunter”’ *Bristol Post*, 29 August 2018, at <<https://www.bristolpost.co.uk/news/bristol-news/judge-throws-out-court-case-1949588>>; K. Dickinson, ‘Paramedic Who Was Caught Trying to Meet Boy, 14, by Paedophile Hunters Suspended’ *Chronicle*, 14 April 2018, at <<https://www.chroniclelive.co.uk/news/north-east-news/paramedic-who-caught-trying-meet-14526779>>.

42 Hadjimatheou, *op. cit.*, n. 24.

43 Bailey and Skeer, *op. cit.*, n. 2.

44 *Id.*

45 A. T. H. Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011), para. 2.5.

prohibiting any ‘publication’⁴⁶ that creates a substantial risk that the course of justice will be seriously impeded or prejudiced, subject to certain conditions.⁴⁷ Under this Act, paedophile-hunting groups may attract liability not only for any prejudicial material that they post about a target, but also for prejudicial comments posted on their pages by third parties. Here, the paedophile-hunting group is a distributor of the post, and their exemption from liability is subject to them taking reasonable care not to distribute such material.⁴⁸

We do not know how many times the poor investigative practices of paedophile hunters have jeopardized potential criminal prosecutions or otherwise led to the unnecessary expenditure of police resources. Given the nature of the prosecution process, poor evidence-gathering practices are unlikely to result in a decision to prosecute the target, and thus are probably also unlikely to come to light through media reporting of this process. Even the reported examples of paedophile hunting, however, lend support to the view that this activity can interfere with the proper administration of justice.

SECOND THREAT: DUE PROCESS

If maximizing the number of successful criminal prosecutions was the sole concern of policy makers, then it might well be the case that paedophile hunting produces a net gain; the free-of-charge evidence supplied by these groups might be useful to the authorities more often than it is detrimental to their own investigations. However, this is not self-evident, and it is not the only concern. There is a real danger that untrained paedophile hunters may undermine due process and violate the fundamental human rights of suspects.

There are numerous cases where this general threat to targets’ fair trial and privacy rights has materialized. In April 2018, a paedophile-hunting group, ironically named Protecting the Innocent, issued a public apology after live streaming a confrontation with an innocent, mistakenly identified target.⁴⁹ As well as mistakenly identifying targets, paedophile hunters may also misuse the power of citizen’s arrest. During many of these filmed confrontations, paedophile hunters tell suspects that they are making a ‘citizen’s arrest’, but this is a narrow legal power.⁵⁰ There is a heavy burden on the citizen who is

46 ‘Publication’ is a term taken to include ‘any speech, writing, or other communication in whatever form, which is addressed to the public at large or any section of the public’. Contempt of Court Act 1981, s. 2.

47 *Id.*

48 *R v. F* [2016] 2 Cr. App. R. 13.

49 G. Newton, ‘Yorkshire Paedophile Hunters Make Public Apology for Falsely Shaming Innocent Man on Live Sting’ *Yorkshire Post*, 24 April 2018, at <<https://www.yorkshirepost.co.uk/news/yorkshire-paedophile-hunters-make-public-apology-for-falsely-shaming-innocent-man-on-live-sting-1-9133413>>.

50 The law permits an individual who is not a police constable to make a citizen’s arrest. However, this power is narrower than the police powers of arrest. It applies only

contemplating making an arrest, as he or she must carefully consider whether a constable could have made the arrest, even if no constable is present at the scene of the confrontation.⁵¹ In cases where, in the end, no crime has been committed, or even in cases where it would be reasonably practicable for a constable to make the arrest instead of a paedophile hunter, hunters could be liable for false imprisonment. False imprisonment does not require any use of force or violence by the defendant, provided that the words said or things done by the defendant amount to a complete restraint on the person⁵² and the defendant is not *lawfully* exercising powers of arrest.⁵³ Given the prevalence of this tactic of making a ‘citizen’s arrest’ in videos shared by these groups, it is perhaps an indication of police sensitivity to paedophile hunters and their followers that hunters are seldom prosecuted for falsely imprisoning their targets.

In many stings, paedophile hunters play a role in encouraging the criminality that they seek to remediate, by engaging in sexual communications and arranging meetings while posing as a child. Here, liability for encouraging or assisting an offender in his or her attempted grooming offence could be made out.⁵⁴ As Stark suggests, for this offence, liability would be dependent on whether the ‘reasonableness’ defence in s. 50 of the Serious Crime Act 2007 applies to non-state entrapment cases.⁵⁵ However, as paedophile hunters are not acting under any official state authority, and it is questionable whether they are acting for the purpose of *preventing* crime, as opposed to garnering a large internet following or virtue testing, it is not clear that they would be covered by the s. 50 defence. Given the broad *actus reus*, paedophile hunters are also usually secondary parties to the attempted s. 15 offence, unless their enterprise is a complete failure.⁵⁶ Undercover police officers are not generally

to more serious, ‘indictable’ offences, and can only be exercised where the citizen reasonably believes that the suspect is committing the indictable offence. Police and Criminal Evidence Act 1984 (PACE), s. 24A, as inserted by Serious Organised Crime and Police Act 2005, s. 110.

- 51 R. C. Austin, ‘The New Powers of Arrest: Plus Ça Change: More of the Same or Major Change?’ (2007) *Criminal Law Rev.* 459, at 469; G. Pearson et al., ‘Policy, Practicalities, and PACE s. 24: The Subsuming of the Necessity Criteria in Arrest Decision Making by Frontline Police Officers’ (2018) 45 *J. of Law and Society* 282.
- 52 *Bird v. Jones* [1845] 7 Q.B. 742, at 748; *Alleyne v. Commissioner of Police of the Metropolis* [2012] EWHC 3955 (QB), para. 171.
- 53 *Walker v. Commissioner of Police of the Metropolis* [2015] 1 W.L.R. 312, at 326 (applying *Collins v. Wilcock* [1984] 1 W.L.R. 1172).
- 54 Serious Crime Act 2007, s. 44.
- 55 *Id.* s. 50; F. Stark, ‘Non-State Entrapment’ (2018) 10 *Archbold Rev.* 6, at 8. Entrapment is a tactic whereby a person is encouraged to commit a crime so that he or she can be prosecuted for it. M. Redmayne, ‘Exploring Entrapment’ in *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, eds. L. Zedner and J. V. Roberts (2012) 157; H. L. Ho, ‘State Entrapment’ (2010) 31 *Legal Studies* 71.
- 56 Accessories and Abettors Act 1861, s. 8, as amended by the Criminal Law Act 1977, s. 65.

prosecuted for these secondary offences as part of sting operations, owing to the fact that they are acting under a duty to the public to enforce the law.⁵⁷ However, paedophile hunters are operating without any state authorization of their activities, and by parity of reasoning they are also outside policies and practices of immunity from prosecution, including the ‘reasonableness’ defence in s. 50.

Despite extensively researching legal databases and newspaper reports of paedophile hunting, the author has not come across a single reported case where paedophile hunters have been prosecuted for encouraging or assisting their targets. The CPS’s legal guidance is also conspicuously vague about how paedophile-hunting stings often involve the commission by paedophile hunters of these offences.⁵⁸ The guidance merely stipulates that offences committed by paedophile hunters ‘may include, but are not limited to assaults, public order offences, or possession of indecent images offences’.⁵⁹

The law does set limits on paedophile-hunting investigations, whether or not the groups themselves observe them. Where paedophile hunters egregiously undermine the fundamental rights of suspects, they may attract various forms of civil or criminal liability. Although this is not an exhaustive list, paedophile hunters could foreseeably attract liability for offences against the person (assault, actual bodily harm, false imprisonment), other serious crimes (blackmail), and civil wrongs (defamation, assault). Some paedophile hunters have faced charges for this more flagrant law breaking.⁶⁰

Since 2018, the Police Service of Northern Ireland (PSNI) has taken a more robust stance against paedophile-hunting activities. Despite reportedly providing assistance and advice to paedophile-hunting groups in the past,⁶¹ the PSNI and the Public Prosecution Service have launched a review of paedophile-hunting cases with a view to charging hunters as well as their targets with any offences that they might have committed in the past.⁶² This

57 *R v. Latif* [1996] 1 W.L.R. 104, at 112; *Nottingham City Council v. Amin* [2000] 1 Cr. App. R. 426, at 431.

58 CPS, ‘Vigilantes on the Internet: Cases Involving Child Sexual Abuse’ (2019), at <<https://www.cps.gov.uk/legal-guidance/vigilantes-internet-cases-involving-child-sexual-abuse>>.

59 *Id.*

60 A. Forrest, ‘Paedophile Hunters Deny Holding Two Men against Their Will as They Face Trial for False Imprisonment’ *Independent*, 5 April 2019, at <<https://www.independent.co.uk/news/uk/crime/paedophile-hunters-predator-exposure-leeds-false-imprisonment-assault-court-a8856681.html>>.

61 C. Young, ‘PSNI Provided Paedophile Hunters with Official Statement Sheets’ *Irish News*, 25 April 2019, at <<https://www.irishnews.com/news/northernirelandnews/2019/04/25/news/psni-provided-paedophile-hunters-with-officials-statement-sheets-1605490/>>; *Belfast Telegraph*, ‘Police Tell “Paedophile Hunters” What They Need for Court – But Say Stop What You’re Doing’, 6 February 2018, at <<https://www.belfasttelegraph.co.uk/news/northern-ireland/police-tell-paedophile-hunters-what-they-need-for-courts-but-say-stop-what-youre-doing-36572782.html>>.

62 V. Kearney, ‘“Paedophile Hunter” to Face Criminal Charges’ *BBC*, 14 February 2018, at <<https://www.bbc.co.uk/news/uk-northern-ireland-43049316>>.

follows a famous case where paedophile hunters from a group called Silent Justice were convicted for a series of public order offences after confronting a journalist who was reporting a story on their activities.⁶³ This seems to suggest that the response by law enforcement agencies to paedophile hunters has been varied, even within individual force areas. It appears that police forces are treading a fine line between their duty to act on credible evidence of child sexual abuse (even if this is supplied by paedophile hunters) and their responsibility to discourage vigilantism and other forms of public disorder.

Courts may also intervene to safeguard due process at trial. Paedophile hunters are under no legal obligation to have regard to any relevant Police and Criminal Evidence Act 1984 (PACE) Codes of Practice when carrying out their investigations. This is because, unlike some local or central government officials, or, in some circumstances, store detectives, paedophile hunters are not 'charged with the duty of investigating offences' under s. 67(9) of PACE, as they are not under 'any type of legal duty, whether imposed by statute or by the common law', to investigate offences.⁶⁴ However, any evidence gathered through the use of questionable or illegal investigatory practices (for example, by trespassing onto private property) could potentially be excluded at the discretion of a trial judge.⁶⁵ Moreover, where paedophile hunters 'interview' their targets without adhering to the relevant PACE Codes of Practice that govern police interviews, this could provide the necessary conditions for the exclusion of a successfully elicited 'confession' by paedophile hunters under s. 76 of PACE.⁶⁶

Are these legal protections sufficient to adequately safeguard the rights of suspects from the activities of paedophile hunters? The frequency with which these rights are undermined seems to suggest not. This might be because paedophile hunters are still able to circumvent other important legal safeguards that exist to regulate police investigations. Unlike the police, paedophile hunters are under no obligation to seek prior authorization for their covert online investigations. Moreover, as will be discussed, there is a greater reluctance for courts to exercise their discretion to stay proceedings as an abuse of process where an accused is entrapped by a non-state party such as a paedophile hunter, rather than by the police. These two areas, where there

63 This case also illustrates the dark underbelly of some paedophile-hunting groups. Two of the members of Silent Justice had criminal histories themselves and had been investigated in relation to alleged links to organized crime. BBC News, "'Paedophile Hunters' Convicted of Intimidating BBC Reporter", 7 February 2019, at <<https://www.bbc.co.uk/news/uk-northern-ireland-47156874>>.

64 *R v. Bayliss* [1994] 98 Cr. App. R. 235, at 238; *R v. Dhorajiwala* [2010] EWCA Crim 1237, para. 18.

65 Under s. 78 of PACE, a trial judge has the discretion to exclude evidence if its admission would have such an adverse effect on the fairness of the proceedings that the judge ought not to admit it. *R v. Morley* [1994] Crim. L.R. 919, at 920; *R v. Shannon* [2001] 1 W.L.R. 51, at 70.

66 *R v. Dhorajiwala*, op. cit., n. 65.

is seemingly a significant disparity between police and paedophile hunter regulation, are explored in turn below.

1. Should paedophile hunters be authorized as Covert Human Intelligence Sources (CHIS)?

As we have seen, paedophile hunters often rely on covert surveillance methods to gather evidence, setting up fake social networking profiles to engage in interactions with targets and collect incriminating evidence. If the police covertly develop online relationships in a similar way, as they often do in their own investigations, their conduct in all likelihood would engage the target's right to respect for private life under Article 8(1) of the European Convention on Human Rights (ECHR),⁶⁷ thus requiring the police, under Article 8(2), to justify their conduct as lawful, and necessary in the pursuit of a legitimate aim. Accordingly, police officers must seek CHIS authorization, as defined by s. 26(8) of the Regulation of Investigatory Powers Act 2000 (RIPA), before engaging in a covert surveillance operation of this kind. RIPA sets limits on the powers of the police to authorize the use of CHIS, requiring authorizing officers to be satisfied that the use of CHIS is both necessary (in pursuit of a purpose specified in s. 29(3))⁶⁸ and proportionate. No such constraints apply to paedophile hunters, who are not, it seems, exercising a public function on behalf of a public authority.⁶⁹ This is concerning, particularly as reports emerge that police officers are providing support and advice to paedophile hunters,⁷⁰ effectively encouraging paedophile hunters to engage in investigatory practices that they themselves would not be able to do without obtaining, and operating within the parameters of, CHIS authorization.⁷¹

The need for authorization is pressing where the police offer guidance and support to paedophile hunters. Indeed, in *MM v. Netherlands*, the European Court of Human Rights (ECtHR) held that where an individual had been guided and assisted by a public authority to collect evidence in a criminal

67 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 005. The European Court of Human Rights (ECtHR) has held that Article 8 protects the right to establish and develop personal relationships, which, of course, is a cornerstone of social networking and participation in online interactions in chatrooms. *S and Marper v. UK* (App nos 30562/04 and 30566/04) [2008] 48 EHRR 1169, para. 66; M. O'Flinn and D. Ormerod, 'Social Networking Sites, RIPA and Criminal Investigations' (2011) *Criminal Law Rev.* 766, at 780; A. Gillespie, 'Regulation of Internet Surveillance' (2009) 4 *European Human Rights Law Rev.* 552, at 562.

68 The two most relevant purposes for the topical focus of this article are perhaps 'for the purposes of preventing or detecting crime or of preventing disorder' and 'in the interests of public safety'.

69 Human Rights Act 1998, s. 6; Regulation of Investigatory Powers Act 2000, Sch. 1.

70 Sandeman, *op. cit.*, n. 4; Young, *op. cit.*, n. 62; *Belfast Telegraph*, *op. cit.*, n. 62.

71 J. Simpson, 'Police Praise Us for Job Well Done, Say Vigilante Paedophile Hunters' *Times*, 26 April 2017, at <<https://www.thetimes.co.uk/article/police-praise-us-for-job-well-done-say-vigilante-paedophile-hunters-gsjs7pjnr>>.

case, the actions of the individual could be imputable to the public authority, thus engaging the responsibility of the state under Article 8 of the ECHR.⁷² The balance of ECtHR jurisprudence in this area does seem to suggest that where police officers offer assistance, equipment, or advice to paedophile hunters without first authorizing their conduct, this constitutes a violation of the Article 8 rights of targets.⁷³

There is ambiguity in cases where the police do not explicitly assist or equip paedophile hunters, but develop more subtle or implicit working relationships. This is illustrated in *R v. Walters and Ali*, where a joint application for a stay of proceedings was refused. Langstaff J observed that it was not a precondition of admissibility of evidence that private citizens acting as paedophile hunters should be expressly subject to CHIS authorization, or behave as if they are when conducting their investigations.⁷⁴ In this case, Dark Justice, a self-described paedophile-hunting group, targeted the defendants. Each defendant interacted with a false persona, created by Dark Justice and placed on a social networking site. Each defendant was led to believe that he was interacting with a girl of 13, and, subsequently, each defendant engaged in conversations of a sexual nature and made attempts to meet the child. Langstaff J rejected the defendants' suggestion that the controls on police investigations in RIPA were unlawfully sidestepped by Dark Justice and the police, who sought to rely on their evidence. In short, Langstaff J observed that there is no need for the police to authorize paedophile hunters where the police do not 'use or conduct' them for the purposes of RIPA, Pt. II, but paedophile hunters are not exempt from any liability arising from their conduct.⁷⁵

While this might be true in cases where the police do not in fact 'use or conduct' paedophile hunters to act as CHIS, Langstaff J adopted an unduly narrow interpretation of the phrase 'use or conduct' in this context. Langstaff J held that the police or the CPS are not 'using or conducting' those who fall within the definition of CHIS merely by accepting the evidence offered by them, and that they are only 'using or conducting' CHIS when they specifically ask CHIS in advance to provide information, covertly.⁷⁶ Langstaff J drew support for this construction from an example contained in the *Covert Human Intelligence Sources Code of Practice*, issued under s. 71 of RIPA.⁷⁷ The example details how no authorization would be required where Y volunteers information to a representative of a public authority about a work colleague out of a sense of civic duty. However, Langstaff J did not seem to recognize that this hypothetical provided slender support for his

72 *MM v. Netherlands* (App no 39339/98) [2004] 39 EHRR 19, para. 39.

73 *A v. France* (App no 14838/89) [1994] 17 EHRR 462, para. 36.

74 *R v. Walters and Ali*, op. cit., n. 36, para. 42.

75 *Id.*, para. 23.

76 *Id.*, para. 39.

77 Home Office, *Covert Human Intelligence Sources Code of Practice* (2014), para. 2.24. This Code has since been superseded by a revised version: Home Office, *Covert Human Intelligence Sources Code of Practice: Revised Code of Practice* (2018).

conclusions regarding the relationship, or lack thereof, between the police and Dark Justice. Here, Y is not acting as CHIS at all, as ‘he has not established or maintained (or been asked to establish or maintain) a relationship with his colleague for the covert purpose of obtaining and disclosing information’.⁷⁸ Langstaff J did not acknowledge the contextual differences between Y’s conduct and the typical paedophile-hunting sting.

The *Code of Practice* stipulates that public authorities should avoid inducing individuals to engage in the conduct of CHIS either expressly or implicitly without obtaining CHIS authorization.⁷⁹ What might count as an implicit inducement? This is a fact-sensitive matter of judgement, but the *Code of Practice* does suggest that those who, like many paedophile-hunting groups, covertly gain access to personal information and voluntarily disclose this information to the police ‘on a repeated basis’ need to be ‘managed appropriately’, and may need to be subject to CHIS authorization.⁸⁰ Indeed, in a revised version of the *Code of Practice*, the following clarifying sentence is added to the section on defining and authorizing CHIS:

An authorisation should be considered, for example, where a public authority is aware that a third party is independently maintaining a relationship (i.e. ‘self-tasking’) in order to obtain evidence of criminal activity, and the public authority intends to make use of that material for its own investigative purposes.⁸¹

This seems to speak precisely to circumstances in which paedophile hunters are repeatedly supplying evidence to the police, and suggests that Langstaff J’s interpretation of ‘using or conducting’ is too narrow.

One objection to a wider interpretation of ‘use or conduct’ might be that, in acting on evidence provided by paedophile hunters, the police and the CPS are only performing their legitimate duties to prevent and prosecute criminality. Indeed, this objection may have merit in some cases – for instance, where a group provides evidence of criminality, without acting covertly and without breaking any laws. However, in many of the cases discussed in this analysis, paedophile hunters are developing covert relationships for the purposes of gathering evidence and are relying on state law enforcement agencies to develop and prosecute cases that they initiate.⁸² In these circumstances, the state becomes the partner in a joint undercover policing enterprise, where paedophile hunters circumvent the safeguards in RIPA and the state uses the fruits of their labour to mount criminal prosecutions. At the point that state law enforcement agencies become aware of this partnership, they should seek to formalize the relationship through the CHIS authorization process. To continue accepting evidence provided by these groups and turn a blind eye to

78 *Id.* (2014), para. 2.24.

79 *Id.*, para. 2.23.

80 *Id.*

81 Home Office, *op. cit.* (2018), n. 78, para. 2.26.

82 Bailey and Skeer, *op. cit.*, n. 2.

how that evidence is gathered is to signal tacit approval of these activities and implicitly induce them.

A useful analogy can be drawn between RIPA, Pt. II and how the courts have interpreted the scope of omissions liability when delineating the limits of the substantive criminal offence of aiding or abetting an offender under s. 8 of the Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977. In this context, it is sufficient for an individual to be held liable for aiding or abetting if he or she has ‘full knowledge of the facts which constitute the offence’ and there is ‘some form of voluntary assistance in the commission of the offence’.⁸³ Here, passive tolerance of criminality in circumstances where D has a power (but not necessarily a legal duty) to take reasonable steps to intervene *in itself* constitutes voluntary assistance and thus meets the *actus reus* requirement of aiding and abetting.⁸⁴ In this context, the law already recognizes that an individual or body can provide implicit assistance or inducement to another by passively tolerating their conduct in circumstances where they have knowledge of it and have a power to take reasonable steps to intervene.

Any interpretation of the police’s obligations under RIPA that would permit them to circumvent their responsibilities under Article 8 to engage in covert surveillance operations only where such surveillance is lawful, proportionate, and necessary, by tacitly inducing or assisting paedophile hunters to act as an unregulated proxy, is wholly unsatisfactory. It is not in keeping with the *Code of Practice*, or the intentions of Parliament in enacting RIPA, Pt. II, which sought to provide robust regulation of covert criminal investigation techniques.⁸⁵

Moving forward then, the term ‘use or conduct’ should be given broad interpretation. ECtHR jurisprudence suggests that Article 8 can be violated not only where the police ask groups to operate undercover on their behalf, but also where they equip, assist, or induce groups to do so. ‘Use or conduct’ may not be amenable to exhaustive definition, but where the police know of paedophile hunters acting covertly and supplying evidence on an ongoing basis, they must carefully consider formalizing the relationship so that the rights of targets are safeguarded by the protections in RIPA.

2. Paedophile hunting as entrapment

The fair trial rights of those targeted by paedophile hunters may also be undermined, as suspects are afforded inadequate protection from entrapment in cases where they are enticed to commit offences by non-state agents. In *R v. Looseley*, the leading domestic case on entrapment, the House of Lords

83 *Tuck v. Robson* [1970] 1 W.L.R. 741, p. 744.

84 Id; A. P. Simester et al., *Simester and Sullivan’s Criminal Law* (2016, 6th ed.) 227.

85 ‘Regulation of Investigatory Powers Bill’ debate, 381 *H.C. Debs.*, col. 774 (6 March 2000).

held that the principal remedy for entrapment is a stay of proceedings for abuse of process.⁸⁶ The House of Lords set out numerous factors that the courts should consider in separating acceptable and unacceptable forms of police conduct, including (among other things) ‘whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime’,⁸⁷ whether there is reasonable suspicion of criminal activity,⁸⁸ the necessity and proportionality of the operation, and the degree of oversight and supervision of the police operation.⁸⁹ The focus for ordering a stay of proceedings, then, is on remedying an abuse of *police* power. This seems to suggest that entrapment in English and Welsh law is understood as a police-directed activity. Commentators have also expressed doubts as to whether a stay of proceedings should be available in so-called non-state or private entrapment cases, where non-state actors have enticed an individual into committing a crime.⁹⁰ These commentators tend to focus on differences in the role and conduct of state and private entrappers.⁹¹

On this basis, one might view the laws regulating entrapment as inapplicable to paedophile hunters, who are characteristically non-state actors.⁹² However, such a conclusion would be premature. In *R v. Looseley*, the House of Lords did not focus on private entrapment.⁹³ Moreover, the domestic courts have not completely closed the door on the prospect of ordering a stay of proceedings in a private entrapment case. In *Council for the Regulation of Health Care Professionals v. General Medical Council and Saluja*, Goldring J concluded that private entrapment could lead to a stay of proceedings, but only in exceptional circumstances, where the conduct of the non-state agent is so egregious that reliance upon it in the court’s proceedings would compromise the court’s integrity.⁹⁴ This door was also left open by the ECtHR in *Shannon v. United Kingdom*, where the ECtHR explicitly stated that private entrapment might render proceedings unfair for the purposes of Article 6 of the ECHR.⁹⁵

In *R v. TL*, the Court of Appeal considered for the first time whether a stay of proceedings for abuse of process should have been available to a

86 *R v. Looseley* [2001] 1 W.L.R. 2060, at 2067.

87 *Id.*, p. 2069.

88 *Id.*, p. 2077.

89 *Id.*, p. 2069.

90 A. Ashworth, ‘Re-Drawing the Boundaries of Entrapment’ (2002) *Criminal Law Rev.* 161, at 174; D. Ormerod, ‘Recent Developments in Entrapment’ (2006) *Covert Policing Rev.* 65; K. Hofmeyr, ‘The Problem of Private Entrapment’ (2006) *Criminal Law Rev.* 319.

91 Hofmeyr, *id.*, p. 332; Ho, *op. cit.*, n. 55, p. 91.

92 Indeed, in *R v. Looseley*, the House of Lords took a state-centric view when defining entrapment as the commission of an offence by a defendant brought about by an agent of the state. *R v. Looseley*, *op. cit.*, n. 87, p. 2066.

93 Hofmeyr, *op. cit.*, n. 91, p. 324.

94 *Council for the Regulation of Health Care Professionals v. General Medical Council and Saluja* [2007] 1 W.L.R. 3094 (henceforth, *Saluja*), at 3110.

95 *Shannon v. United Kingdom* (App no 67537/01) [2004], para. 12.

defendant on the basis that he had been entrapped by paedophile hunters.⁹⁶ The respondent, L, allegedly made arrangements via WhatsApp to meet a girl whom he believed to be 14 years old, so she could take part in a threesome with him and his girlfriend. The person with whom L was actually communicating was U, an adult male, who ran a paedophile-hunting group called Predator Hunters. After U set up a sting and contacted the police, L was prosecuted.⁹⁷ At trial, L successfully applied to stay the proceedings as an abuse of process relying on the entrapment principles set out in *R v. Looseley*. The Court of Appeal subsequently allowed the prosecution's appeal of this decision, determining that, as U did no more than provide an unexceptional opportunity to offend, the requirements of entrapment were not satisfied. Lord Burnett CJ held that the trial judge erred in making no distinction between the conduct of U, a private citizen, and agents of the state when deciding whether to stay the prosecution as an abuse of process.⁹⁸ Lord Burnett CJ acknowledged that misconduct by a private citizen might be sufficient grounds for a successful application for a stay of proceedings, but, in the absence of state impropriety, he observed that 'the situations in which that might occur would be rare'.⁹⁹ Applying this general rule to the immediate facts, he concluded that, given that U had committed no offences, did not take the lead in interactions with L, and was scrupulous to avoid encouraging his interlocutor in the proposed sexual activity, U's conduct was far removed from the sort that might attract a stay of proceedings.¹⁰⁰

The judgement left some uncertainty over exactly where the line is to be drawn between acceptable misconduct by paedophile hunters and misconduct so gross that a stay of proceedings would be in order. What we might assume is that in cases where paedophile hunters have manufactured or interfered with the evidence to create a false impression that the defendant was engaged in criminal activity, a stay of proceedings might be available (although the senior courts have yet to confirm that even these circumstances are exceptional enough in their egregiousness to warrant a stay). Conversely, at a minimum, if paedophile hunters remain within the parameters of acceptable police-directed undercover operations, as Lord Burnett CJ suggested U did in *R v. TL*, then it is plain that a stay of proceedings would not be available to the defendant. Lord Burnett CJ's interpretation of the rule in *Saluja* was sound, but it leaves uncertain terrain between these poles. Given the growth of paedophile hunting and the variation in the methods used by paedophile hunters, this lack of clarity is regrettable.

It is also difficult to discern a principled basis for the distinction that English law draws between private and state entrapment, at least in the

96 *R v. TL* [2018] 1 W.L.R. 6037.

97 *Id.*, p. 6039.

98 *Id.*, para. 31.

99 *Id.*, para. 32.

100 *Id.*, para. 33.

context of paedophile hunting. Defenders of the distinction tend to focus on the moral authority of the state to prosecute offenders, in cases where the state's agents have had a hand in cultivating or encouraging the offending.¹⁰¹ In cases of private entrapment, so the argument runs, the state has played no part in the dubious methods of evidence collection adopted by the private party and, consequently, it does not lose its moral authority to use this evidence.¹⁰² However, as we have seen, the paedophile hunter's *modus operandi* often involves committing criminal offences, and some of these groups are developing close ties with the police.¹⁰³ Even if this was a principled basis for treating private and state entrapment differently, courts should still be alert to cases where the police contradict their oft-stated condemnatory position on paedophile hunting by collaborating with or assisting these groups.

Stark rejects the state/private distinction altogether, suggesting that the main concern for domestic courts when considering a stay of proceedings on grounds of entrapment should be whether the alleged activity involved the manufacture of criminal behaviour.¹⁰⁴ On this view, the problem is not that the state has 'dirtied its hands' by engaging in illegitimate investigatory techniques. Rather, it is that the state has endorsed entrapment as a legitimate investigatory technique upon which a criminal conviction can be founded.¹⁰⁵ Thus, where an individual goes to exceptional lengths to tempt another to commit crime, owing to the nature of the activity, the court's moral authority to condemn the accused is compromised regardless of whether the individual is a private citizen or a representative of the state. There have been reported cases where paedophile hunters have engaged in such virtue-testing activities, and courts at first instance have consequently stayed proceedings.¹⁰⁶ Recently, in *Procurator Fiscal, Dundee v. P*, a Scottish court also held that the activities of two paedophile hunters in luring an individual to engage in illicit sexual communications were inadmissible.¹⁰⁷ However, this was overturned on appeal in a decision that focused narrowly on the lower court's competency to consider the admissibility of the evidence before the trial had commenced, and thus did not grapple with the entrapment-related issues.¹⁰⁸ While the willingness of courts at first instance to recognize the problems of excessive

101 D. J. Birch and C. Barsby, 'Abuse of Process: Supply of Cocaine to Journalists Posing as Drug Users' (2001) *Criminal Law Rev.* 220, at 221; Hofmeyr, *op. cit.*, n. 91.

102 A. Dyer, 'The Problem of Media Entrapment' (2015) *Criminal Law Rev.* 311, at 327; P. Roberts, 'Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial' in *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*, eds. P. Roberts and J. Hunter (2013) 189.

103 Simpson, *op. cit.*, n. 72.

104 Stark, *op. cit.*, n. 56, p. 8.

105 A. Duff et al., *The Trial on Trial, Volume Three: Towards a Normative Theory of the Criminal Trial* (2007) 236.

106 Bennett, *op. cit.*, n. 41.

107 *Procurator Fiscal, Dundee v. P* [2019] G.W.D. 16-247, para. 5.

108 *Procurator Fiscal, Dundee v. P* [2019] S.A.C. Crim. 7.

tempting and manipulation is encouraging, the senior courts of the United Kingdom have yet to delineate how much more investigatory leeway should be afforded to paedophile hunters than to the police when they actively tempt their targets to engage in criminal activity, or to explicate a rationale for affording this leeway at all.

The advantage of Stark's approach is that it gives defendants increased protection from this illegitimate investigatory practice at times when people are more likely to be subject to it – namely, when they are targeted by unregulated, untrained, or unvetted amateur sleuths. It also seems to better capture why entrapment is objectionable, and why a stay of proceedings is the primary remedy. Citizens should reasonably expect to be able to go about their business without being subject to random virtue testing or coaxed into criminal conduct. The criminal justice system exists to remediate and deter criminal wrongdoing, and these functions are not served when criminal conduct is manufactured. To the extent that courts 'play their part' by affording paedophile hunters investigatory leeway to engage in precisely this manufacturing of criminality, they undermine their own integrity. Where paedophile hunters create exceptional opportunities to offend, going beyond the established boundaries of legitimate proactive policing by state agents, the proceedings should be stayed.

THIRD THREAT: STIGMATIZATION AND COLLATERAL INTRUSION

Confrontations uploaded to social media, and sometimes live streamed, are perhaps the most striking feature of paedophile hunting. As discussed above, there is an obvious risk to the fair trial rights of targets where footage of a confrontation is uploaded before the conclusion of criminal proceedings. This footage is often circulated widely and left open for comment by members of the public, before a court has had the opportunity to make an order restricting publication to safeguard the target's right to a hearing in front of an impartial jury.¹⁰⁹ The dangers to the presumption of innocence¹¹⁰ have also been exhibited above.¹¹¹

This section considers how, even if a targeted individual is ultimately found guilty, the practice of uploading filmed confrontations may have an unjustifiably corrosive effect. Before discussing the consequences of and justifications for this activity, it is worth reflecting on English and Welsh law's approach to this practice, which offers very little protection to targets. First, paedophile hunters are not a 'public authority' and are not exercising a 'public

¹⁰⁹ See, for example, *R v. F*, op. cit., n. 49.

¹¹⁰ The presumption of innocence is taken as a fundamental principle of political morality that the treatment of an individual should be consistent with his or her innocence, and not as a narrow doctrinal safeguard, grounded in a trial setting. A. Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (2010) 38.

¹¹¹ Newton, op. cit., n. 50.

function' under s. 6 of the Human Rights Act 1998,¹¹² so a target could not bring an Article 8 ECHR claim against the group directly. This leaves a cause of action for misuse of private information. Article 8 of the ECHR, as enforced via the Human Rights Act 1998, obliges courts to develop the common law so as to give effect to that right by extending (if required) the tort of misuse of private information.¹¹³ Here, again, the claim would in all likelihood fail. Any such action would likely fail at the first stage of the Article 8 analysis. In *Kinloch v. HM Advocate*, the Supreme Court held that the appellant's Article 8(1) rights could not be engaged when he partook in criminal activities in places where he was open to public view.¹¹⁴ Moreover, in *In re JR38*, the Supreme Court declined the opportunity to draw a distinction with *Kinloch v. HM Advocate* in circumstances where the applicant committed crimes in public when aged 14, and footage of his involvement in criminal activity was circulated to the local media in his community.¹¹⁵

Although human rights law does not (currently) protect individuals who have footage of their confrontation with paedophile hunters circulated online, the general principles of human rights law and, particularly, the proportionality analysis that is implicit in Article 8 ECHR case law¹¹⁶ provide a useful framework for structuring a normative evaluation of the practice. This requires a consideration of the nature and seriousness of any conflicting interests; an assessment of whether the measure pursues a legitimate aim; and an analysis of whether the measure can be expected to achieve this aim, and is proportionate.¹¹⁷

Thus, we should first examine some of the detrimental consequences that can arise, and indeed have arisen, from the practice of disseminating footage of confrontations. These consequences can be devastating for the individual, who is likely to be stigmatized in his or her own community and will inevitably become the target of malicious comments by followers of the group's social media pages. In some cases, those subject to such treatment have taken their own lives, and, in the case of a 43-year-old man confronted by the Southampton Trap group in 2017, an inquest concluded that social media activity following the circulation of video footage of his sting online was a causal factor that led to his suicide.¹¹⁸

Drawing on interview data collected in the United States from those who have had their custody images circulated online by private companies on so-

112 *YL v. Birmingham City Council* [2008] A.C. 95, para. 103.

113 *Campbell v. Mirror Group Newspapers Ltd.* [2004] 2 A.C. 457, para. 16.

114 *Kinloch v. HM Advocate* [2013] 2 A.C. 93, p. 107.

115 *In re JR38* [2016] A.C. 1131.

116 M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International J. of Constitutional Law* 574, at 579.

117 M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (2012) 8.

118 R. Hartley-Parkinson, 'Man Killed Himself after Paedophile Hunters Exposed Him for Grooming Girl' *Metro*, 27 February 2018, at <<https://metro.co.uk/2018/02/27/man-killed-paedophile-hunters-exposed-grooming-girl-7344952/>>.

called ‘mugshot databases’, Lageson and Maruna suggest that the circulation of this information can disrupt traditional criminal justice processes:

Whereas police and prosecutors (representing the state) and journalists (representing the public interest) have historically been key gatekeepers of punishment practices, the internet has profoundly changed this model by offering users easy access to criminal justice information and platforms to actively engage in the stigmatization process by republishing, commenting, and critiquing criminal records.¹¹⁹

The authors’ participants reported that the publication of their image and criminal record online was stigmatizing and humiliating. Moreover, the authors noted how this disruption to traditional criminal justice processes could have a criminogenic effect.¹²⁰ That is to say, the existence of these permanent and ever-multiplying online records of an individual’s confrontation with paedophile hunters might disrupt his or her efforts to rebuild family ties and regain employment after serving his or her sentence, and this disruption can, in turn, reduce the likelihood that the individual will desist from criminal offending.

The idea that the degradation and stigmatization of an individual by society can diminish his or her bonds to the community and push him or her towards crime is well established in criminological literature, and has received significant empirical support.¹²¹ Moreover, there is the potential that this extrajudicial stigmatization online will unduly exacerbate collateral damage in the lives of the targeted individual’s family members. Empirical research from Levenson suggests that family members living with a registered sex offender are likely to experience differential treatment and stigmatization as knowledge of their family member’s criminal past filters out into the community.¹²² An internal guidance document setting out the joint position of the National Police Chiefs’ Council and the National Police Child Protection and Abuse Investigation working group acknowledges these risks and suggests that paedophile hunters often ‘have little or no consideration for any safeguarding intervention required for vulnerable adults or children who may have contact with the suspect’.¹²³ The practice of uploading footage of confrontations will, in all likelihood, accelerate and exacerbate any detrimental impact occasioned by a paedophile-hunting sting, both for the target and also for his or her immediate family.

119 S. E. Lageson and S. Maruna, ‘Digital Degradation: Stigma Management in the Internet Age’ (2018) 20 *Punishment & Society* 113, at 115.

120 *Id.*, pp. 125–126.

121 K. T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (1966); J. Braithwaite, *Crime, Shame and Reintegration* (1989); D. P. Farrington and J. Murray (eds.), *Labelling Theory: Empirical Tests* (2014).

122 J. S. Levenson, ‘Collateral Damage: Family Members of Registered Sex Offenders’ (2009) 34 *Am. J. of Criminal Justice* 54, at 65.

123 Bailey and Skeer, *op. cit.*, n. 2.

From the above analysis, it is prudent to conclude that, even in less damaging cases where, say, family impact is quite remote and footage is disseminated post-conviction, this activity is likely to carry serious implications for the individual's private life. Any interests served through dissemination should be justified in the face of serious countervailing consequences. This raises the following questions: what is the aim of disseminating footage, and could the activities of paedophile hunters in pursuing this aim ever be considered proportionate?

Some groups have defended uploading videos of their confrontations on the grounds that the public have a 'right to know' about child sex offenders in their community.¹²⁴ However, it is questionable whether the public has any such putative right. First, it is not clear what this right entails. This is not a claim right, such that any resident could sue the Government for failures of notification that a person living in his or her community has been subject to a paedophile-hunting sting. Such groups appear to be describing a bare liberty, such that people are – currently – free to disseminate and receive such information (provided that they do not defame the target or commit any other civil wrong).

This is yet another area where paedophile hunters are able utilize social media to engage in policing activities (here, quickly disseminating their work to a mass public audience) but are not constrained by the rules that limit state law enforcement agencies (police guidance limits the police identification of suspects and arrestees to exceptional circumstances,¹²⁵ and the House of Lords is currently legislating to narrow the circumstances in which arrestees' personal information can be publicized¹²⁶). If the aim is simply to inform the public of offenders in their community, then uploading video footage of stings – where targets are often subject to (frequently abusive) interrogations in states of acute emotional distress – seems to go much further than necessary.

A second aim of dissemination, some paedophile-hunting groups claim, is to deter others from engaging in online child sexual abuse. On this view, any negative consequences may be justified when taken in the round as the publication of stings will reduce crime by sending out a clear message that those who engage in this offending run the risk not only of criminal sanction, but also of humiliation and stigmatization at the hands of paedophile hunters.

124 ITV, 'Paedophile Hunter Group Defend Their Work after Eight Men Take Their Lives after Being Named and Shamed Online', 9 January 2019, at <<https://www.itv.com/news/tyne-tees/2019-01-09/paedophile-hunter-group-defend-their-work-after-eight-men-take-their-lives-after-being-named-and-shamed-online/>>.

125 College of Policing Guidance on this matter stipulates that 'police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose to do so ... A legitimate policing purpose may include circumstances such as a threat to life, the prevention or detection of crime, or where police have made a public warning about a wanted individual.' College of Policing, *Authorised Professional Practice: Media Relations* (2016), para. 4.2.

126 'Anonymity (Arrested Persons) Bill [HL]' debate, 796 *H.L. Debs.*, col. 418 (1 March 2019).

Thus, it is argued, the publication of videos may have a general deterrent effect on would-be child sex offenders, and consequently safeguard children from degrading or even violent sexual abuse.

It is perfectly legitimate for concerned citizens to safeguard the rights of children within the parameters of the law and, as we have seen, the dissemination of footage of confrontations is (typically) perfectly legal. It seems understandable, then, that some groups have attracted popular support for their efforts to deter future offending by stigmatizing targets. However, none of this makes the practice of disseminating footage of stings desirable or proportionate. First, the notion that disseminating footage of confrontations will reduce crime is asserted without empirical evidence of this deterrent effect. Although this idea – that more severe stigmatization administered through this quasi-punishment will have a deterrent effect – might be intuitively appealing to some, deterrence research suggests that increasing the severity of punishments in this way is unlikely to have any significant effect on crime rates.¹²⁷ There is some evidence to suggest that a perceived high risk of *detection* on the part of the potential offender may have a deterrent effect for certain categories of offenders in favourable conditions,¹²⁸ and, in publicizing their stings so widely, paedophile hunters could conceivably increase the general perception among potential offenders that they are at a high risk of getting caught. However, it is not clear that child sex offenders – who often lack empathy, act impulsively, and display anti-social personality traits – make good candidates for this form of deterrence.¹²⁹ Any measure of stigmatization designed to deter offending behaviour should be underpinned by reliable evidence of likely responsiveness on the part of the targeted offender or potential offender. The circulation of footage of confrontations, in all their grim detail, by paedophile hunters cannot be said to satisfy this criterion.

Even if this form of shaming could successfully reduce offending, there is good reason for resisting its tacit acceptance as a legitimate citizen-led response to child sexual abuse. Paedophile hunters, as private citizens acting on their own intuitions, lack the constitutional standing to administer this

127 A. N. Doob and C. M. Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143; J. M. Darley, 'On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences' (2005) 13 *J. of Law and Policy* 189.

128 A. von Hirsh et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999) ch. 10.

129 R. K. Hanson and K. E. Morton-Bourgon, 'The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies' (2005) 73 *J. of Consulting and Clinical Psychology* 1154; D. Fisher et al., 'Comparison of Sex Offenders to Nonoffenders on Selected Psychological Measures' (1999) 43 *International J. of Offender Therapy and Comparative Criminology* 473; T. N. Gingrich and J. B. Campbell, 'Personality Characteristics of Sexual Offenders' (1995) 2 *Sexual Addiction & Compulsivity* 54; S. Smallbone et al., *Preventing Child Sexual Abuse: Evidence, Policy and Practice* (2008) 102.

measure as a form of quasi-punishment. It is the state's responsibility to punish criminal offending, and this responsibility should not be systematically usurped by paedophile hunters in the way that it is when they take deliberate punitive measures to stigmatize their targets. This conclusion rests on social contract reasoning: it is the responsibility of the state to administer punishments for those who have committed crimes, and not of individual citizens (unless the state itself has chosen to delegate this function).¹³⁰ This is the prevailing model of criminal justice in liberal democratic societies, and its practical justification lies in preventing the breakdown of social order that would result if people were left to 'take the law into their own hands' in responding to criminal offences.¹³¹

Where paedophile hunters administer their own quasi-punishments, there is no transparency regarding the principles or values guiding their decisions. The various paedophile-hunting groups to emerge, each with its own largely *ad hoc* practices, are bound to produce inconsistent and unjust outcomes that are contrary to the rule of law. These detrimental consequences have been documented above. The dissemination by paedophile hunters of video footage of confrontations with targeted individuals seems gratuitously stigmatizing, and thus it does not strike a fair or proportionate balance between the interests and rights of those targeted and the ostensible aim pursued by paedophile hunters – namely, safeguarding children from sexual abuse. This stigmatizing treatment of the target occurs in the absence of a principled basis or the sort of coherent, evidence-based crime prevention rationale that might justify the pains of a formal criminal sanction.

CONCLUSION

Any balanced analysis of paedophile hunting must recognize that these groups are diverse. Some groups have collected evidence that has led to the successful prosecution of repeat child sex offenders, and sometimes those same groups have engaged in troubling practices. Other groups have engaged in serious violence, and do not produce evidence that could be used in a criminal prosecution. The main finding from the above analysis is that English and Welsh law, both in books and action, seems to afford more investigatory discretion to paedophile hunters than to state law enforcement agencies. Paedophile-hunting groups can circumvent procedural safeguards and regulations that exist to moderate state power and protect the human rights

130 See Ashworth, writing on the potentially deleterious impacts of increased victim involvement in sentencing: A. Ashworth, 'Is Restorative Justice the Way Forward for Criminal Justice?' (2001) 54 *Current Legal Problems* 347, at 367; M. Thorburn, 'Proportionate Sentencing and the Rule of Law' in *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, eds. L. Zedner and J. V. Roberts (2012) 282.

131 Ashworth, *id.*, p. 357.

of those subject to a criminal process. In praising these groups and offering opportunities for collaboration, some police forces are tacitly encouraging paedophile hunters to think that they can and should operate without having regard to the limits that the legislature has imposed on police investigations. In giving unduly narrow interpretation to procedural safeguards, such as the CHIS authorization process and entrapment, the domestic courts have only served to fuel this misconception.

Consequently, targets of paedophile-hunting investigations are not afforded the same level of protection as those targeted in police-led covert investigations. Empirical claims that the success of these groups justifies affording this discretion are specious. They tend to overlook the various risks of paedophile hunting and rely on unproven generalizations about the deterrent effect of disseminating video footage of confrontations. Even if empirical claims that paedophile hunting significantly reduces crime could be substantiated, it is unprincipled to afford greater discretion to citizens to conduct intrusive covert surveillance operations than to state law enforcement agencies, which are not unproblematic by any means, but at least have the mandate to act in the public interest to prevent crimes. It should not be permissible for procedural safeguards and human rights laws to be bypassed by groups of citizens who decide for themselves to engage in intrusive surveillance, public censure, and shaming exercises. The idea undermines the ethos of these provisions, which exist to ensure the fair trial rights of suspects and to protect against arbitrary abuses of power. Yet English and Welsh law, as it is currently constituted and applied, tolerates these protections and safeguards being circumvented in this way.

There is good reason, then, for robustly regulating the activities of paedophile hunters. One approach might involve creating a criminal offence for impersonating a child in an online communication. Such an offence would prohibit people from luring individuals to engage in illicit conversations online and, thus, would effectively prohibit a key element of most paedophile-hunting stings. This would clear up any ambiguity on behalf of the police and the CPS over whether engaging in paedophile-hunting activities involves the commission of a criminal offence, and would communicate a clear message to law enforcement agencies that unregulated covert operations are not to be tolerated. However, the downside of this approach is that the blunt instrument of an all-encompassing criminal offence could prevent the police from using strong evidence gathered by groups that are more cognizant of the rules of engagement, and mindful of due process concerns.

To harness the benefits that more conscientious groups could provide, while minimizing the risks where this activity is left without specific regulation, the new criminal offence could incorporate a defence for those who are working as part of a formal collaboration with the police. This could bring paedophile-hunting activities into alignment with the regulations and policies to which state law enforcement agencies adhere in their criminal investigations. While, at this stage, calls from senior police figures for collaboration between the

police and paedophile hunters seem premature at best, and self-serving at worst, there might be some scope for police–paedophile hunter collaboration in future. The creation of an offence, with a defence for those working with law enforcement agencies, leaves the door open to positive collaborations as a possibility, while enabling and encouraging state institutions to take a firmer approach in suppressing harmful paedophile-hunting activities.

However, there are at least two significant obstacles that would need to be overcome before such collaboration could be considered viable. First, any such collaboration would need to be resourced. It is difficult to see how collaboration would work without considerable investment of police resources to recruit, vet, train, equip, and supervise citizens involved in collaborative operations. If restrictions on police resources really do explain why paedophile hunting has emerged as a response to online child sexual abuse, then it is not clear that formal collaboration offers the solution. Second, as the above analysis indicates, it is also not clear that any paedophile-hunting groups share the precise aims or values of state law enforcement agencies, such that they would make suitable candidates for formal collaboration.

Whether or not such an offence and defence are ever enacted, it is crucial that the courts and the prosecutorial arm of the state do more to deter and denounce paedophile hunting. Where paedophile hunters commit criminal offences in the pursuit of their targets (such as encouraging the commission of the s. 15 offence), both hunter and target should be prosecuted so that the conduct of both is meaningfully deterred. The CPS should issue clearer guidance on the breadth of offences that these groups can – and often do – commit, and the courts should not allow paedophile hunters to operate outside the constraints of police-led covert investigations. The institutions of the state have been too placatory towards paedophile hunters, and this approach is being exposed for its shortcomings with each passing report of a paedophile-hunting investigation gone wrong. A new approach is needed to safeguard not only those subject to paedophile-hunting stings and their families, but also the core institutional values of the criminal justice system.